

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

UNITED CITIES GAS PETITION FOR
APPROVAL OF NEW OR REVISED
FRANCHISE AGREEMENTS WITH
KINGSPORT, BRISTOL, MORRISTOWN
AND MAURY COUNTY

01 OCT 26 PM 2 01

EXECUTIVE SECRETARY

Docket No. 00-00562

MOTION FOR PARTIAL SUMMARY JUDGMENT

United Cities Gas Company ("United Cities"), by and through counsel, submits this Motion for Partial Summary Judgment on the issue raised by the Consumer Advocate and Protection Division of the Office of the Attorney General (the "Consumer Advocate") concerning the legality of the franchise fee provisions imposed in the Morristown and Bristol franchises.¹

The Consumer Advocate contends that franchise fees that are not specifically tied to the costs incurred by the municipality from the regulated activity are invalid based on the decision of the Court of Appeals in City of Chattanooga v. BellSouth Telecommunications, Inc., et al., 2000 WL 122199 (Tenn. Ct. App. Jan. 26, 2000).² The following analysis demonstrates that the

¹ The Consumer Advocate did not intervene or object to the approval of the Maury County franchise agreement. Order Granting Intervention By Consumer Advocate, October 23, 2000, pp. 2-3. The Kingsport franchise does not impose a franchise, however, it gives the City the option of imposing a fee at a later date. Both UCG and Kingsport acknowledge that should a fee be subsequently adopted, it must also be approved by the TRA pursuant to Tenn. Code Ann. 65-4-107.

² No appeal was filed in this case and the decision was not published. Pursuant to Tenn. Sup. Ct. Rule 4(H)(1), the decision is only considered "persuasive authority" and not "controlling authority."

Consumer Advocate's reliance on the BellSouth case is misplaced, in light of the circumstances of the instance case.

STATEMENT OF FACT

When United Cities negotiated the franchise agreements with the City of Morristown and the City of Bristol, it was operating under existing franchise agreements with both municipalities. See Affidavit of Bob Elam. Morristown had granted United Cities a 20-year franchise on December 18, 1979 pursuant to Ordinance No. 2203. This franchise did not initially provide for a franchise fee, although it allowed the City the right to levy such a fee in the future. Morristown exercised this option on January 4, 1983, when it negotiated with United Cities and passed Ordinance No. 2344 which imposed a 5% gross receipts franchise fee on all gas sales by United Cities within the corporate limits of the City. Prior to the expiration of the this franchise, the City of Morristown passed Ordinance No. 3022 granting United Cities the franchise that is currently before the TRA for approval. This franchise is for a 15-year term, with the same 5% franchise fee on gross receipts from retail gas sales. This new franchise with the City of Morristown resulted from a series of negotiations over the terms and conditions numerous substantive provisions in the agreement. The franchise agreement was extensively modified from its previous form to include several new provisions including maintaining an office within the City, specifying the gas main extension policy and a default and cure provision. The 5% franchise fee, however, remained unchanged. Id.

In Bristol, United Cities was operating under the franchise granted by Ordinance No. 95-60 at the time it entered negotiations with the City in 1999. This franchise imposed a 5% franchise fee on gross revenues from the gas sold by United Cities within the City. In 1999, by mutual agreement, the City of Bristol and United Cities entered a series of negotiations to amend

the franchise. The negotiations resulted in the agreement that is currently before the TRA for approval. The new agreement extends the franchise for a period of 30 years from the date of amendment, increases the franchise fee by 1%³ and gives the City a right of first refusal to purchase the United Cities assets in the City on the same terms and conditions of any offer presented to United Cities by a third party.⁴ Id.

On or about October 5, 1999, the City of Bristol passed Ordinance No. 99-13 on final reading which incorporated the terms and conditions of the amended franchise agreement negotiated between the City and United Cities.

The negotiations between Morristown and Bristol and United Cities were at arms length and resulted in substantive modification of the then-existing franchise agreements. Clearly, both Morristown and Bristol were operating in their proprietary capacities throughout the negotiations. Id.

ISSUE

Whether the decision of the Tennessee Court of Appeals in City of Chattanooga v. BellSouth Telecommunications, et al., 2000 WL 122199 (Tenn. Ct. App. Jan. 26, 2000)⁵ renders the franchise fee provisions of the Morristown and Bristol franchise agreements invalid although each municipality acted in its proprietary capacity in the negotiation of the agreements with United Cities.

³ The amendment also included a provision to allow the City to increase the franchise fee by 1% every ten years, but not to exceed 8%. Any increase would be subject to TRA approval and subject to refund should it not be approved by the TRA.

⁴ A statutory merger, consolidation recapitalization, or sale or transfer of the common stock of the company would not constitute a sale subject to the right of first refusal provisions. The City would have a 60-day period to exercise the right and an additional 60 days to close the transaction.

⁵ No appeal was filed in this case and the decision was not published. Pursuant to Tenn. Sup. Ct. Rule 4(H)(1) is only considered persuasive authority and not controlling authority.

ARGUMENT

The Consumer Advocate's reliance on the BellSouth case is entirely misplaced. The Consumer Advocate ignores the legal distinction recognized in BellSouth between a municipality acting in its proprietary capacity verses its governmental capacity when instituting a franchise fee. In BellSouth, the court confirmed the longstanding Tennessee Supreme Court precedence in regard to the distinction between a municipality acting in its proprietary as opposed to its governmental capacity.

A municipality has authority to act in either its proprietary capacity or its governmental capacity. See *Bristol Tennessee Housing Auth. v. Bristol Gas Corp.*, 407 S.W.2d 681 (Tenn. 1966). Acting in its proprietary capacity, a municipality may exact a charge for the use of its rights-of-way unrelated to the cost of maintaining the rights-of-way, but in its governmental capacity, it may only act through an exercise of its police power to regulate specific activity or to defray the cost of providing services or benefit to the party paying the fee. *City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997); *Bristol Tenn. Housing Auth.*; *City of Paris v. Paris-Henry County Public Unity District*, 340 S.W.2d 885 (Tenn. 1960).

The BellSouth court held that the City of Chattanooga had acted under its governmental function and not under its proprietary function in imposing the franchise fee at issue. Accordingly, the court held that the fee imposed by the municipality had to bear a reasonable relation to the cost of the regulation. Id. at 2.

The actions taken by the City of Chattanooga in the BellSouth case are totally distinguishable from the steps taken by either Morristown or Bristol in our case. First, Chattanooga adopted an ordinance which imposed the 5% gross revenue fee across the board on all companies providing telecommunication services within the City. Second, Chattanooga passed the ordinance without negotiating with the individual companies then providing or planning to provide telecommunication services within the City. Third, two of the defendants

held prior franchise agreements with the City that did not provide for a 5% franchise fee. The ordinance at issue served to retroactively modify the pre-existing franchise agreements.

Acting in its proprietary capacity, a municipality may not revoke or impair rights previously given by it to a third party by a subsequent enactment. Id. at 2, citing Bristol Tenn. Housing Auth.; Shelby County v. Cumberland Telephone, and T. Co., 203 S.W.2d 342 (Tenn. 1918). Where a franchise fee is negotiated as a contract between a city and an individual utility, the city is acting in its proprietary capacity. Lewis v. Nashville Gas & Heating Co., 40 S.W.2d 409, 412 (Tenn. 1931). As a result, the BellSouth court found that Chattanooga had operated in its governmental capacity.⁶

In the instant action, United Cities entered into direct negotiations with Bristol and Morristown. Substantive negotiations were conducted with both municipalities which resulted in specific modifications of several provisions in the agreements. In the case of Morristown, the fee was not changed. Although the fee was modified in the Bristol agreement by one percent, other substantive changes were made. Unlike the City of Chattanooga, neither Bristol or Morristown acted unilaterally to increase the franchise fee, nor did they apply increase fees retroactively in disregard of existing agreements or pass ordinances which imposed a higher uniform fee on a general class of industries or utilities.

Accordingly, the Consumer Advocate's objection to the franchise fees imposed in the Bristol and Morristown franchise agreements based on the holding in the BellSouth case is misplaced and should be dismissed.

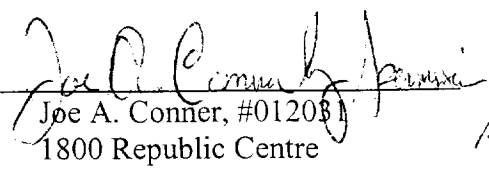
⁶ If a city is acting in its proprietary capacity, it is not legally authorized to unilaterally modify a franchise by imposing a fee. Id. at 2.

CONCLUSION

Based on the foregoing reasons, United Cities requests that the TRA dismiss the Consumer Advocate's objection to the franchise fees set forth in the Morristown and Bristol franchise agreements.

Respectfully submitted,
BAKER, DONELSON, BEARMAN,
& CALDWELL, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, to the following person(s) , this 26th day of October, 2001.

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